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NO. 89-80

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1988

LEON KATZ, et al.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the mandatory retirement of judges at age seventy serves any legitimate state purpose, and therefore complies with the Equal Protection and Due Process Clauses of the Fourteenth Amendment?

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STATEMENT OF THE CASE

1. The petitioners, sitting judges of the Commonwealth of Pennsylvania, attack the constitutionality of the Commonwealth's mandatory retirement law. Pennsylvania's Constitution provides that "[j]ustices, judges and justices of the peace shall be retired upon reaching the age of 70 years." Pa. Const. art. V, § 16(b); Pa. Cons. Stat. tit. 42, § 3351 (1988)(same). The petitioners claim that this provision deprives them of the equal protection of the laws and of substantive due process, in violation of the Fourteenth Amendment to the Constitution.

2. In 1968, Pennsylvania adopted a new Judiciary Article to its Constitution, the result of a special convention convened to consider amendments to the Pennsylvania Constitution.

Included in that new Judiciary Article was Article V, § 16(b), the mandatory retirement provision at issue in this case.

The Judiciary Article was the product of extensive deliberations by the Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention. The Judiciary Subcommittee summarized the arguments favoring a mandatory retirement provision, stating that a mandatory retirement policy:

> substantially increases judicial manpower when a plan for part-time post-retirement service exists. By continually bringing in younger judges while retaining the part-time services of willing and able retired judges, a system of mandatory retirement plus post-retirement service helps solve the pressing problem of court congestion and delay. As mentioned previously, Pennsylvania already has provided for voluntary post-retirement service.

> eliminates unpleasantness of removing aged and disabled judges on an individual selective basis. Mandatory retirement is more impersonal than individual removal: everyone is treated alike. The difficulty and unpleasantness of determining which judges are senile and which are not is largely avoided.
>
> prevent[s] harm by few senile judges [which] more than offsets loss of judges who retain full powers past normal age. Besides, the services of able retired judges may be secured by a provision for post-retirement service.
>
> corresponds with current trend towards mandatory retirement in other public and private employments. There appears to be no good reason why judges should be treated differently from other public officials, teachers, executives, and other professional people who are subject to compulsory retirement.

Pet. App. 12-13, quoting Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention, Reference Manual

No. 5 at 203-04 (1968); see Malmed v. Thornburgh, 621 F.2d 565, 567-69 (3d Cir.), cert. denied, 449 U.S. 955 (1980).

The convention adopted the mandatory retirement language drafted by the Judiciary Subcommittee. When ratified by popular vote on April 23, 1968, that language became Article V, § 16 of the Pennsylvania Constitution.

While Article V, § 16(b) requires retirement of judges at age 70, Article V, § 16(c) provides that "a former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial services as may be prescribed by rule of the Supreme Court."

3. This case was filed in Pennsylvania's Commonwealth Court by

Harold Gondelman, a Pittsburgh lawyer,[1] and the petitioners intervened as plaintiffs at various stages in the proceedings. The petitioners claimed that Pennsylvania's constitutionally-mandated retirement for judges a) itself violated the State Constitution; b) violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA); and c) violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Commonwealth demurred to all the claims, and the petitioners moved for summary relief, see Pa. R. App. Proc. 1532(b); the court consolidated the demurrer and the motion for summary relief for argument before the court en banc.

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[1]Mr. Gondelman is not a petitioner in this Court. Pet. at ii.

On the state constitutional issue, the court was equally divided. Three judges would have held that one provision of the State Constitution cannot violate another, and accordingly would have sustained the Commonwealth's demurrer. Pet. App. at 27-32. Three judges disagreed, and would not only have overruled the demurrer but would have granted summary relief to the petitioners. Pet. App. at 42-45.

On the ADEA claim, the court unanimously sustained the demurrer, holding that, as elected officials, judges are expressly exempted from coverage under the statute. Pet. App. at 32-37, 42-43.

On the federal constitutional claims, the court was again unanimous. Pet. App. at 37-42. The court recognized

that the federal Court of Appeals had considered and rejected identical claims in Malmed v. Thornburgh, 621 F.2d 565 (3d Cir.), cert. denied, 449 U.S. 955 (1980), Pet. App. at 38, but nevertheless overruled the Commonwealth's demurrer. In Malmed, the Court of Appeals had held that the mandatory retirement provision was rationally related to several legitimate state goals, and therefore passed muster under both the Equal Protection and Due Process Clauses. Id., at 569-78. The Commonwealth Court declined to follow Malmed, holding that "[t]he passage of time and experience may have shown that these reasons no longer exist or that mandatory retirement of judges at age 70 has not achieved

the objectives sought." Pet. App. at 41. Finding it impossible to decide this question on the record before it, the court likewise rejected petitioners' request for summary relief. Pet. App. at 42. The Commonwealth Court then certified the case for immediate appeal to the Supreme Court of Pennsylvania, Pet. App. at 48, which allowed the appeal. Pet. App. at 4; see Pa. Cons. Stat. tit. 42, § 702(b) (1988).

4. The Pennsylvania Supreme Court sustained the Commonwealth's demurrer to both the state and federal constitutional claims.[2] The Supreme Court held that the State Constitution could not violate itself, Pet. App. at 17-22; and held, essentially following

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[2]The petitioners did not pursue their claim under the ADEA in the state Supreme Court, and they do not pursue it in this Court.

the analysis in Malmed v. Thornburgh, supra, that the mandatory retirement provision did not deprive the petitioners of either equal protection or substantive due process, Pet. App. at 5-16.

The Supreme Court began with the proposition, established by this Court in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) and Vance v. Bradley, 440 U.S. 93 (1979), that the elderly are not a "suspect class" and that classifications based on age need only have some rational basis to survive constitutional scrutiny. Pet. App. at 7-11. Turning then to the mandatory retirement provision, the court focused on the history of the Constitutional Convention, specifically the reports of the Judiciary

Subcommittee to the Preparatory Committee, and found that the provision was intended to further four separate and legitimate state purposes: the reduction of court congestion, the elimination of the unpleasantness of selectively removing aged and disabled judges, the prevention of harm by senile judges, and conformity with the general trend toward mandatory retirement at seventy in other public and private employment. Pet. App. at 12-13 n.7. The Supreme Court noted that "the reasons for this provision were clearly articulated during the [constitutional] convention and offered to the public in securing their vote....Those reasons have not been, nor can they be, challenged on the ground that they do not have a reasonable relationship to a legitimate state purpose." Pet. App. at 12.

The Supreme Court rejected the idea, embraced by the Commonwealth Court, that the petitioners should be allowed to present evidence that the mandatory retirement provision did not in fact serve the purposes it was intended to serve:

> Accepting, for the consideration of this contention, that these positions could be established, they would not be relevant to the constitutional analysis....If the selected method is not the most effective or efficient method to achieve the State objective, the people may remedy that by amending that provision.

Pet. App. at 14-15. The Supreme Court therefore sustained the Commonwealth's demurrer and ordered the action dismissed. Pet. App. at 22.

One Justice dissented on the state constitutional issue, Pet. App. at 22-23, without discussing the federal issue.

REASONS FOR DENYING THE WRIT

Nothing about this case requires review by the Court. In holding that mandatory retirement for judges is constitutional, the Pennsylvania Supreme Court agreed with every other state supreme court, and every federal court of appeals, which has considered the issue. The decision below is an uneventful application of principles which the Court long ago settled and which there is no reason to reconsider.

1. The Pennsylvania Supreme Court correctly applied Massachusetts Board of Retirement v. Murgia, supra and Vance v. Bradley, supra to hold that Pennsylvania's mandatory retirement law is rationally related to four separate and legitimate state interests, and that

it therefore passes muster under both the Equal Protection and Due Process Clauses. Pet. App. at 7-13. The Third Circuit, considering identical claims in Malmed v. Thornburgh, supra, had earlier done the same. Other courts have reached the same conclusion. Mandatory retirement laws for judges are not uncommon, and the courts have uniformly held them to be rationally based.[3]

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[3]Hatten v. Rains, 854 F.2d 687 (5th Cir. 1988), cert. denied, No. 88-1455 (June 12, 1989); Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), cert. denied, 444 U.S. 906 (1979); Rubino v. Ghezzi, 512 F.2d 431 (2d Cir.), cert. denied, 423 U.S. 891 (1975); O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978); Grinnell v. State, 121 N.H. 823, 435 A.2d 523 (1981); Maresca v. Cuomo, 64 N.Y.2d 242, 475 N.E.2d 95 (1984), appeal dismissed, 474 U.S. 802 (1985); Nelson v. Miller, 25 Utah 2d 277, 480 P.2d 467 (1971); Aaronstam v. Cashman, 132 Vt. 538, 325 A.2d 361 (1974).

In light of this uniformity, there is obviously no need for the Court to review this case in order to resolve a conflict among the lower courts. Nor does this case present a novel question of federal law. The principles that govern constitutional challenges to age-based classifications were settled by the Court in Murgia and Vance, and the application of those principles to the facts of a particular case is not the sort of question that justifies discretionary review by the Court.

Nor is it likely that the court below erred in applying those principles. It is unlikely that mandatory judicial retirement, upheld in so many states, should be rational in those states but irrational in Pennsylvania; and it is equally unlikely--but the only alternative-- that all of the courts that have

decided this issue have decided it wrongly.

2. Inevitably, then, the petitioners are driven to ask the Court to "review and correct" Murgia and Vance, Pet. at 24, and to hold that age is a suspect classification subject to strict judicial scrutiny. Pet. at 23-25. There is no reason for the Court to do so.

Contrary to what petitioners say, Pet. at 24, it is only a few years since the Court quoted with approval its holding in Murgia, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985), and expressly refused to undermine it: "We are reluctant to set out on that course [of extending suspect class status to the aged and other groups], and we decline to do so." Id., at 446.

Nor is there any need to do so now. In Cleburne, the Court declined to extend suspect class status to the mentally retarded, in part because the sympathetic legislative response to their problems belied any need for special judicial protection from the majoritarian political process. Id., at 443-45. This analysis applies with even greater force to the elderly,[4] and

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[4]A partial list of those legislative responses includes, on the federal level, the Medicare program, 42 U.S.C. §§ 1395-1395ccc, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. In Pennsylvania, they include the creation of a cabinet-level Department of Aging, Pa. Stat. Ann. tit. 71, §§ 581-1 through 581-12 (Purdon Supp. 1989); a prohibition against employment discrimination based on age, 43 Pa. Stat. Ann. tit. 43, § 955(a)(Purdon Supp. 1989); property tax rebates for the elderly, Pa. Stat. Ann. tit. 72, §§ 4751-1 through 4751-11.3 (Purdon Supp. 1989); and pharmaceutical assistance for the elderly, Pa. Stat. Ann. tit. 62, §§ 2901-2908 (Purdon Supp. 1989).

vindicates Murgia's perception that the elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities." Murgia, 427 U.S. at 313.

3. The petitioners' claim that mandatory retirement deprives them of substantive due process by subjecting them to an "irrebuttable presumption of incompetence," Pet. at 26, is without substance. Pennsylvania does not use age as a proxy for competence, but uses mandatory retirement to serve a variety of legitimate goals, of which the removal of unfit judges is but one. Pet. App. at 12-13. The Pennsylvania Supreme Court, like the Third Circuit and other courts before it, was thus correct to treat the petitioners' substantive due process claim as subsumed within their equal protection

claim, and perforce to reject it. Pet. App. at 5; Malmed, 621 F.2d at 573-77 and n.19. "[A] classification that meets the [equal protection] test...is perforce consistent with the due process requirement...." Weinberger v. Salfi, 422 U.S. 749, 770 (1975), quoting Richardson v. Belcher, 404 U.S. 78, 81 (1971).

4. As to the petitioners' procedural due process claim, Pet. at 28, it was neither raised in, nor considered by, either of the courts below, and the Court should not consider it now.

CONCLUSION

For the foregoing reasons, the respondent asks the Court to deny the writ of certiorari.

Respectfully submitted,

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